

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs August 26, 2008

TIMOTHY CALLAWAY v. STATE OF TENNESSEE

**Direct Appeal from the Criminal Court for Knox County
No. 81175 Kenneth Irvine, Jr., Judge**

No. E2008-00305-CCA-R3-PC - Filed October 23, 2008

The petitioner, Timothy Callaway, appeals the post-conviction court's denial of his petition for post-conviction relief. On appeal, he argues that he received the ineffective assistance of counsel which caused him to enter unknowing and involuntary guilty pleas. After a thorough review of the record and the parties' briefs, the judgment of the post-conviction court denying relief is affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

J.C. McLIN, J., delivered the opinion of the court, in which JOHN EVERETT WILLIAMS and ROBERT W. WEDEMEYER, JJ., joined.

Albert J. Newman, Jr., Knoxville, Tennessee, for the appellant, Timothy Callaway.

Robert E. Cooper, Jr., Attorney General and Reporter; Leslie E. Price, Assistant Attorney General; Randall E. Nichols, District Attorney General; and Jeff Blevins, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

BACKGROUND

Pursuant to a plea agreement, the petitioner pled guilty to two counts of robbery, case numbers 73147 and 73905. Subsequently, the trial court sentenced the petitioner to four years for the robbery in case number 73147 and six years for the robbery in case number 73905. The trial court ordered the petitioner's robbery convictions to run consecutively for a total effective sentence of ten years.

The petitioner filed a timely petition for post-conviction relief. Thereafter, counsel was appointed and an evidentiary hearing was held. At the hearing, the petitioner testified that he was charged with two aggravated robberies. The petitioner recalled that the trial court appointed counsel to represent him on the two robbery charges. The petitioner complained that during the four months between counsel's appointment and the date of the petitioner's guilty pleas, he only met with counsel

twice. According to the petitioner, he discussed the charges with counsel and told counsel that he had committed one of the robberies but was innocent of the other. Nonetheless, he decided to plead guilty to the two robberies as it was the best thing to do in his situation.

The petitioner claimed counsel told him that he would receive concurrent sentences of four years and six years in exchange for pleading guilty to the robbery offenses. The petitioner asserted that he did not realize he was sentenced consecutively until he saw his paperwork in prison. The petitioner then sought to have his sentence reduced via motion, but his motion was denied by the trial court. According to the petitioner, had he realized he was receiving consecutive sentences he would have weighed his options more closely before pleading guilty to the robbery offenses.

On cross-examination, the petitioner stated that he did not pay attention to what the trial court told him at the guilty plea hearing because counsel had already explained the plea agreement to him. The petitioner said he could not remember the trial court's sentencing order, indicating that the petitioner's sentences would run consecutively for an effective sentence of ten years. On re-direct examination, the petitioner asserted that he did not know what consecutive meant until after he was incarcerated. However, he acknowledged that the court's imposition of a total sentence of ten years was not ambiguous.

The petitioner's trial counsel testified that he was appointed to represent the petitioner on the robbery charges. Counsel noted that he met with the state prosecutor and discussed the disposition of the case against the petitioner. Counsel stated that he discussed the case numerous times with the petitioner. Counsel recalled that he discussed the plea agreement with the petitioner and specifically addressed the sentences the petitioner would receive. Counsel recalled that he advised the petitioner that he would have to serve his sentences consecutively. Counsel further recalled that the trial court advised the petitioner during the guilty plea hearing that his sentences would run consecutively. Counsel said it was made clear to the petitioner that he was going to serve a ten year sentence.

After the hearing, the post-conviction court entered an order denying post-conviction relief. The petitioner appealed.

ANALYSIS

On appeal, the petitioner maintains that he received the ineffective assistance of counsel which caused him to enter unknowing and involuntary guilty pleas.

In order for a petitioner to succeed on a post-conviction claim, the petitioner must prove the allegations of fact set forth in his petition by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f). On appeal, this court is required to affirm the post-conviction court's findings unless the petitioner proves that the evidence preponderates against those findings. *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999). Our review of the post-conviction court's factual findings, such as findings concerning the credibility of witnesses and the weight and value given their testimony, is de novo with a presumption that the findings are correct. *See id.* Our review of the post-conviction court's legal conclusions and application of law to facts is de novo without a presumption of correctness. *Fields v. State*, 40 S.W.3d 450, 457-58 (Tenn. 2001).

To establish the ineffective assistance of counsel, the petitioner bears the burden of proving that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense rendering the outcome unreliable or fundamentally unfair. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see also Arnold v. State*, 143 S.W.3d 784, 787 (Tenn. 2004). Deficient performance is shown if counsel's conduct fell below an objective standard of reasonableness under prevailing professional standards. *Strickland*, 466 U.S. at 688; *see also Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975) (establishing that representation should be within the range of competence demanded of attorneys in criminal cases). Prejudice is shown if, but for counsel's unprofessional errors, there is a reasonable probability that the outcome of the proceeding would have been different. *Strickland*, 466 U.S. at 694. A fair assessment of counsel's performance "requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689; *see also Nichols v. State*, 90 S.W.3d 576, 587 (Tenn. 2002). Both deficient performance and prejudice must be established. *Strickland*, 466 U.S. at 697; *see also Goad v. State*, 938 S.W.2d 363, 370 (Tenn. 1996). If either element of ineffective assistance of counsel has not been established, a court need not address the other element. *Strickland*, 466 U.S. at 697.

When a petitioner claims ineffective assistance of counsel in relation to a guilty plea, the petitioner must show a reasonable probability that, but for the errors of his counsel, he would not have pled guilty. *See Hill v. Lockhart*, 474 U.S. 52, 59 (1985); *Adkins v. State*, 911 S.W.2d 334, 349 (Tenn. Crim. App. 1994). When determining the knowing and voluntary nature of the guilty plea, the standard is "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *North Carolina v. Alford*, 400 U.S. 25, 31 (1970); *see also State v. Pettus*, 986 S.W.2d 540, 542 (Tenn. 1999). In making this determination, the court must consider:

the relative intelligence of the defendant; the degree of his familiarity with criminal proceedings; whether he was represented by competent counsel and had the opportunity to confer with counsel about the options available to him; the extent of advice from counsel and the court concerning the charges against him; and the reasons for his decision to plead guilty, including a desire to avoid a greater penalty that might result from a jury trial.

Blankenship v. State, 858 S.W.2d 897, 904 (Tenn. 1993) (citations omitted). A petitioner's solemn declaration in open court that his or her plea is knowing and voluntary creates a formidable barrier in any subsequent collateral proceeding because these declarations "carry a strong presumption of verity." *Blackledge v. Allison*, 431 U.S. 63, 74 (1977).

In the instant case, the post-conviction court found that the petitioner received the effective assistance of counsel and that the petitioner's guilty pleas were knowing and voluntary. As the court aptly stated to the petitioner:

Based on the testimony the Court has heard here today, your post-conviction petition will be denied. Let me explain why.

What I have before me is . . . a transcript of the [guilty plea] proceedings. I have your testimony and I have [counsel's] testimony. And the Court credits [counsel's] testimony and credits the transcript for that matter, and it shows that you were informed that it was a four-year sentence and a six-year sentence. It's [mentioned] numerous times . . . in the transcript as a consecutive sentence in that it is a ten-year sentence.

I've read the transcript here today. It also was discussed during the testimony. And it reflects that you were asked under oath if you understood that these [sentences] were consecutive; you said you did. D[id] you understand it was a ten-year sentence; you said you did.

You come in here today and say that you weren't paying attention. You would have said anything at that point. What you're doing when you say that[,] is you're admitting that you would lie under oath and then want me to credit your testimony here today that you're being truthful today.

. . . .

The Court finds that the [guilty plea] transcript controls here, that you were informed, that [your] basis [for relief] . . . is not valid.

I credit the testimony of [counsel]. He has testified . . . truthfully here today that before the agreement he would have told you that it was consecutive, that it was a ten-year sentence. That he recalls being in court that the [plea] transcript is accurate. That there was plea paperwork filled out . . . that's another place where you would have been informed that it was a[n] . . . effective ten-year sentence

In the instant case, counsel's testimony, which was accredited by the post-conviction court, reveals that counsel spoke with the petitioner about his case, negotiated a favorable plea agreement, and explained to the petitioner the nature and consequences of the guilty plea, including the effective ten-year sentence he was to receive. In addition, the guilty plea hearing transcript shows that the petitioner was instructed by the trial court on the charges to which he would be entering pleas of guilt. The trial court then informed the petitioner on several occasions during the plea colloquy that his sentences would run consecutively for a total effective sentence of ten years. The transcript further reflects that the petitioner informed the court that his pleas were free and voluntary and that he approved of the plea bargain agreement. The record does not preponderate against the post-conviction court's findings that the petitioner received the effective assistance of counsel and that the petitioner's guilty pleas were knowing and voluntary. Accordingly, the petitioner is not entitled to relief.

CONCLUSION

Based on the foregoing reasoning and authorities, we affirm the judgment of the post-conviction court.

J.C. McLIN, JUDGE